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Supreme Court, U.S.
FILED
NOV 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-406

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARION F. COLE, PERSONAL REPRESENTATIVE OF THE ESTATE OF DEBORAH D. EISENHUT, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below erred in granting summary judgment to the United States on the ground that Florida law imposes no duty upon the employer of an independent contractor to supervise safety at the contractor's premises.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a-32a) is reported at 846 F.2d 1290. The opinion of the district court (Pet. App. 1a-10a) is reported at 651 F. Supp. 221.

JURISDICTION

The judgment of the court of appeals (Pet. App. 34a-35a) was entered on June 10, 1988. A petition for rehearing was denied on August 4, 1988 (Pet. App. 33a). The petition for a writ of certiorari was filed on September 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the personal representative of Deborah Eisenhut, an employee of Ordnance Research, Inc. (ORI),

who was killed in an explosion at an ORI laboratory in Fort Walton Beach, Florida. When the explosion occurred, Ms. Eisenhut was loading smoke cartridges with an ORI compound known as 119G. ORI was manufacturing 119G purusant to a contract with the U.S. Army Armament Research and Development Command (ARRADCOM) that called for ARRADCOM to purchase 1,500 cartridges from ORI at a total cost of less than $10,000. ORI had developed 119G to meet ARRADCOM's demand for a composition that would create a flash and signature smoke for mortar practice rounds. Pet. App. 1a-2a.

Under Armed Services Procurement Regulations (32 C.F.R. Pts. 1-101 (1982)),[1] contracts involving ammunition and explosives are governed by safety procedures set forth in the Department of Defense Contractors' Safety Manual for Ammunition, Explosives, and Related Dangerous Materials (Safety Manual). A prescribed safety clause to this effect is automatically included in such contracts. The head of procurement at ARRADCOM, however, has discretion either to omit this safety compliance clause entirely, thereby eliminating the application of the Safety Manual to the contract, or to include the clause but waive any mandatory requirements of the Safety Manual. See 32 C.F.R. 1.323.!(c) (1982). ARRADCOM has made a policy decision to make the requirements of the Safety Manual mandatory at all contractor owned and operated facilities except when orders are placed for

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[1] The regulations governing ARRADCOM's contract with ORI were known first as the Armed Services Procurement Regulations and later as the Defense Acquisition Regulations and were codified at 32 C.F.R. Pts. 1-39 (1982). These regulations have been superseded and replaced by the Federal Acquisition Regulations codified in Title 48 of the Code of Federal Regulations. Because the original regulations continue to apply to contracts entered into while they were in force, citations to the original regulations are used throughout.

"standard commercial items" in an amount less than $10,000. Pet. App. 3a.

The Chief of the Support Contracting Division, Procurement Directorate, of ARRADCOM elected not to include the safety clause in ARRADCOM's contract with ORI. Accordingly, ARRADCOM did not exercise its right to supervise safety at ORI's premises pursuant to the terms of the Safety Manual, nor did ARRADCOM insist that ORI adhere to the Safety Manual's specifications. Pet. App. 3a. ORI did, however, take precautions against an accidental explosion caused by static electricity. ORI required Ms. Eisenhut to wear a Wriststat to ground herself while she worked with 119G. Although the precise cause of the February 28, 1980, explosion is uncertain, Ms. Eisenhut was seen not wearing her Wriststat shortly prior to the accident. *Id.* at 24a.

2. After her administrative claim under the Federal Tort Claims Act was denied, petitioner filed this lawsuit alleging that ARRADCOM's failure to enforce or comply with procedures detailed in the Safety Manual helped cause the explosion. Petitioner also alleged that ARRADCOM failed to notify ORI of 119G's dangerous nature and that ARRADCOM breached its duty to inform ORI that government inspectors had observed safety violations during 119G's manufacture.

Following extensive discovery and oral argument, the district court on December 23, 1986, granted summary judgment for the United States (Pet. App. 1a-10a). The court noted (*id.* at 2a-6a) that ARRADCOM exercised policy-making discretion when it decided, pursuant to 32 C.F.R. 1-323.1 (1982), to omit the safety clause from its contract with ORI. Accordingly, the court found (Pet. App. 6a) that the discretionary function exception to the FTCA barred any claim against the United States for Ms.

Eisenhut's injuries based on ORI's alleged failure to comply with procedures in the Safety Manual.

The district court also concluded (Pet. App. 6a-8a) that ARRADCOM had breached no duty that it owed to Ms. Eisenhut under Florida law. The court noted (*id.* at 6a-7a) that Florida law imposes no duty upon employers to assure the safety of employees of independent contractors. The court further found inapplicable (*id.* at 8a) the exceptions to this general rule for employers who exercise supervisory control over the employees of independent contractors or who own the premises where an accident occurs.[2]

3. The court of appeals affirmed (Pet. App. 12a-32a). The court found (*id.* at 22a) that Florida law does not impose any duty on the purchaser of goods to notify the manufacturer of hazards involved in the production process. Moreover, the court concluded (*id.* at 22a-28a) that, even if ARRADCOM has such a duty, the record contained no evidence suggesting that ARRADCOM had superior knowledge of any dangers posed by small-volume manufacture of compound 119G. The court also found (*id.* at 29a- 32a) that Florida law imposed no obligation on parties hiring independent contractors to provide a safe workplace for the contractors' employees. Accordingly, the court concluded that petitioner had asserted no plausible theory that would render the United States liable had it been a private party acting under Florida law. The court, therefore, found (*id.* at 32a n.13) no reason to reach the issue resolved by the district court of whether the discre-

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[2] The district court also rejected (Pet. App. 9a-10a) plaintiff's claim that the government negligently communicated misinformation about the hazard level of compound 119G on the ground that it was barred by the misrepresentation exception of the FTCA, 28 U.S.C. 2680(h).

tionary function exception to the FTCA would bar petitioner's claim.[3]

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, no further review is warranted.

1. Petitioner contends (Pet. 6-9) that the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), does not bar her suit. As the court of appeals correctly noted (Pet. App. 32a n.13), however, summary judgment for the United States was properly granted regardless of whether Section 2680(a) barred petitioner's claim. The FTCA renders the United States liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Accordingly, petitioner could prevail only if she could establish that ARRADCOM breached a duty that a private party would owe to an employee of an independent contractor under similar circumstances. As the courts below correctly found (Pet. App. 6a-8a, 21a-32a), Florida courts have repeatedly adhered to "the general rule that one who hires an independent contractor is not liable for injuries sustained by that contractor's employees in their work." *Skow* v. *Department of Transportation*, 468 So. 2d 422, 423 (Fla. Dist. Ct. App. 1985). Accord *City of Miami* v. *Perez*, 509 So. 2d 343, 345 (Fla. Dist. Ct. App.), review denied, 519 So. 2d 987 (Fla. 1987); *Crawford* v. *Florida Steel Corp.*,

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[3] Following this Court's intervening decision in *Berkovitz* v. *United States*, No. 87-498 (June 13, 1988), petitioner filed a petition for rehearing asking the court of appeals to reconsider its opinion on the discretionary function issue. The court of appeals denied the petition without opinion (Pet. App. 33a).

478 So. 2d 855 (Fla. Dist. Ct. App. 1985); *Van Ness* v. *Independent Construction Co.*, 392 So. 2d 1017 (Fla. Dist. Ct. App.), review denied, 402 So. 2d 614 (Fla. 1981).

Petitioner contends (Pet. 5) that ARRADCOM failed to conduct adequate safety inspections and failed to insist on adherence to the Safety Manual. The Florida Court of Appeals has clearly held, however, that an employer hiring an independent contractor is not responsible for failing to supervise conditions at the work site. *Van Ness*, 392 So. 2d at 1019-1020. Liability will not be imposed simply because the employer fails to monitor the contractor's compliance with safety regulations. *Skow*, 468 So. 2d at 424. Moreover, even when an accident occurs on the employer's premises, the employer will be liable only if it commits "identifiable acts of negligence" (*Perez*, 509 So. 2d at 346). Here, petitioner alleges (Pet. 5) that government employees witnessed the conditions at the ORI facility and failed to correct them. The Florida courts, however, have explicitly held (see, *e.g.*, *Perez*, 509 So. 2d at 347) that the mere presence of an on-site inspector is insufficient to create employer liability, and there is no evidence to suggest that government employees observed hazards that they had reason to suspect ORI itself did not perceive. In short, Florida law would afford no relief to petitioner suing a private party under similar circumstances. Accordingly, petitioner had no cause of action under the FTCA.

2. Petitioner misunderstands the import of the lower courts' ruling concerning Florida law and consequently offers no serious challenge to it. Instead, petitioner claims (Pet. 9-10) that the courts below resolved disputed issues of fact in a manner contrary to the standards governing summary judgment set forth in *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986), and *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986). As *Anderson* makes clear (477 U.S. at 247-250), however, the district court's role when

deciding a summary judgment motion is to review the evidence presented and to determine whether a reasonable jury could properly infer that the nonmoving party had met its burden of persuasion. Here, following extensive discovery, the district court correctly concluded (Pet. App. 6a-8a) that no record evidence would support a jury verdict for petitioner because ARRADCOM breached no duties owed to petitioner under Florida law.

The court of appeals carefully reviewed the record (Pet. App. 22a-28a) under the assumption that Florida law might impose an additional duty on ARRADCOM to notify ORI if ARRADCOM knew of dangers posed by 119G and ARRADCOM knew or had reason to know that ORI was unaware of these dangers. Applying the proper summary judgment standard, the court of appeals concluded (*id.* at 24a) that "the inference cannot be made that ARRADCOM possessed such knowledge." Petitioner identifies no evidence nor suggests any inference to contest this conclusion. Indeed, ORI's own safety practices suggested that ORI was fully aware of the hazards involved in manufacturing 119G (see *id.* at 24a-28a). Accordingly, summary judgment was properly granted because the record contained no evidence suggesting that ARRADCOM had breached any duty owed to petitioner under Florida law.

3. Petitioner insists (Pet. 6) that the "central issue" in this case is whether the discretionary function exception bars a claim based on the government's failure to enforce mandatory safety regulations. Even assuming that the discretionary function exception does not bar petitioner's suit, however, petitioner must nonetheless state a cause of action against the United States under Florida law. Since both courts below have concluded that petitioner has failed to do so, and since petitioner does not seriously challenge that conclusion, there is, as the court of appeals

concluded, no occasion even to consider whether the discretionary function exception would bar such a suit.

In any event, even if ARRADCOM had been responsible for the safety of ORI employees under Florida law, the district court correctly concluded (Pet. App. 4a-6a) that petitioner's claims were foreclosed by the discretionary function exception. As this Court explained in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 819-820 (1984), "[w]hen an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind." The district court therefore correctly determined (Pet. App. 4a-5a) that ARRADCOM's decision not to incorporate the provisions of the Safety Manual in the contract with ORI was an exercise of discretion immune from suit under the FTCA.

Petitioner, relying on this Court's recent decision in *Berkovitz* v. *United States*, No. 87-498 (June 13, 1988), contends that *Varig Airlines* is inapposite because ARRADCOM had a mandatory duty to include a clause in the purchase contract incorporating the Safety Manual. The relevant regulation (32 C.F.R. 1-323.1(c) (1982)) here, however, explicity authorized a procuring agency to omit the safety clause. Pursuant to that regulation, ARRADCOM made a policy decision to permit contracting officers to omit the clause for all purchase contracts for standard commercial items in amounts less than $10,000 (Pet. App. 3a). ARRADCOM's contract with ORI covered smoke cartridges purchased for $8,935, and ARRADCOM's contracting officers exercised their discretion to omit the safety clause after determining that the cartridges were standard commercial items, a term not defined by statute or regulation. Since the contracting officers were required to balance the explicit regulatory goal of reducing

administrative costs on small purchases (32 C.F.R. 3-601 (1982)) with the safety gains expected from compliance with the manual, the choice concerning whether to include the safety clause involved a "policy judgment" that both *Berkovitz* (slip op. 4-5) and *Varig Airlines* (467 U.S. at 820) clearly shield from suit.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1988

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[4] Petitioner's reliance upon *McMichael* v. *United States*, 751 F.2d 303 (8th Cir. 1985), is similary misplaced. In *McMichael*, the Defense Department had included in its purchase contract with the manufacturer the clause incorporating the Safety Manual that ARRADCOM explicitly omitted here. Accordingly, the Eighth Circuit concluded (751 F.2d at 304 (emphasis added)) that the FTCA did not bar "the plaintiffs from recovery for failure to enforce compliance with the safety requirements *of the contract*." The Eighth Circuit thus found (*id.* at 307) that the government's failure to discover safety violations on the manufacturer's premises did not involve the exercise of discretion because the Defense Department had already exercised its discretion to undertake the safety requirements of the Safety Manual and had three on-site inspectors to enforce those requirements. ARRADCOM, by contrast, chose not to include the safety clause in its contract with ORI, and it assumed no responsibility for safety at ORI's premises.

U.S. GOVERNMENT PRINTING OFFICE 1988 — 241 699/60748